Santa Clara Law Review

Volume 32 | Number 4 Article 7

1-1-1992

Speech Regulation at the University of California: Void for Vagueness or Overbreadth

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SPEECH REGULATION AT THE UNIVERSITY OF CALIFORNIA: VOID FOR VAGUENESS OR OVERBREADTH?

I. INTRODUCTION

As children we were taught that, "sticks and stones may break my bones but words will never hurt me."[1] However, in response to an upsurge of racism on college campuses nationwide, universities have enacted various forms of anti-harassment policies to suppress racial antagonism.[2] In particular, the University of California adopted a policy applicable to all nine University of California campuses designed to combat harassment.[3] The University of California Harassment Policy (UC Harassment Policy) in subsection 51.xx prohibits:

> The use of "fighting words" by students to harass any person(s) on University property, on other property to which these policies apply as defined in campus implementing regulations, or in connection with official University functions or University-sponsored programs.
> "Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently

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1. Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 11-12 (1990) (explaining the falsity of this children's rhyme in the context of sexist speech in the workplace); *see also* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143 (1982) (illustrating that mere words can cause mental, emotional, and even physical harm).

2. A number of universities have adopted or are considering restrictions on slurs directed at individuals based on their sex, sexual orientation, race, disabilities, ethnicity, or religion. These include: University of California, Stanford University, The University of Michigan, University of Connecticut, Emory University, Brown University, Tufts University, Pennsylvania State University, University of Texas at Austin, Arizona State University, University of Pennsylvania, and University of Wisconsin. Robin Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues.* CHRON. OF HIGHER EDUC., Oct. 4, 1989, at A1, A38; *see also* Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-33 (citing examples of racial incidents on college campuses nationwide); Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 DUKE L.J. 574, 575-76 (citing examples of subtle discriminatory behaviors that are not covered under current campus harassment regulations).

3. Jonathan Shapiro, *UC's Doctrine of Silence*, RECORDER, Oct. 2, 1989, at 1.

> likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "Fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.[4]

Public school regulations are subject to constitutional scrutiny.[5] Thus, the UC Harassment Policy could be challenged under constitutional doctrines which protect freedom of expression.[6]

The First Amendment of the United States Constitution[7] prohibits governmental action restraining free speech. However, in *Chaplinsky v. New Hampshire*[8] the United States Supreme Court held that language constituting "fighting words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace"[9] does not warrant constitutional protection.

There are two distinct viewpoints as to whether free speech on college campuses should be regulated in order to curb an upsurge of

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4. UNIVERSITY OF CAL. UNIVERSITYWIDE STUDENT CONDUCT: HARASSMENT POLICY § 51.xx (Sept. 21, 1989) (implementing addition to UNIVERSITY OF CAL., POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS (PART A) (1983) [hereinafter UC Harassment Policy].

5. The United States Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" in Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). Although the Court stated that particular expressive activities could not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," the Court held that there was no absolute constitutional right to use all parts of a school or its environs for unlimited expressive purposes. *Id.* at 509; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

For a general discussion of First Amendment implications in educational institutions, see Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 360-63 (1991).

6. This comment will focus on the two closely related doctrines of overbreadth and vagueness. *See infra* part II.B-C; *see also* Edward M. Chen, *Preface* to Jens B.Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-fitting Garb*, 12 HASTINGS COMM. & ENT. L.J. 593 (1990). "The critical constitutional question is not whether there is sufficient justification for rules prohibiting harassment, but whether any proposed regulation is narrowly drawn and sufficiently clear so as to avoid the First Amendment problems of overbreadth and vagueness." *Id.* at 597.

7. U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech").

8. 315 U.S. 568 (1942).

9. *Id.* at 572.

racial intolerance. They highlight the tension between the promotion of the equal protection guarantees of the Fourteenth Amendment[10] and the right of free speech.[11] One view advocates that campus racism results in minorities being treated as second-class students.[12] University administrators must therefore regulate hate speech because it will ensure equal educational opportunities to minority students by not subjecting them to racial assaults.[13] Furthermore, hate speech can be regulated because it falls under the "fighting words" exception to First Amendment protection.[14]

The opposing arguments focus on the inherent difficulty of effective speech regulation without violation of the fundamental First Amendment freedom of speech guarantee.[15] For example, speech restrictions have traditionally been overturned as content-based restrictions that are constitutionally prohibited.[16] The basic premise of this view is that more speech, rather than less speech, will promote equality.[17] One federal court has already decided that a campus policy regulating hate speech was vague and overbroad in *Doe v. University of Michigan*.[18]

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10. U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

11. *But see* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 (claiming this is a false dichotomy and that the goals are instead mutually reinforcing).

12. *See generally*, Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-73 (1989) (discussing the resultant inequality created by racist remarks among university students); Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 323-27 (1990) (noting the effects of racism and disparaging remarks to historically disadvantaged groups in the university setting).

13. Ira Eisenberg, *Fighting Words: Race and Free Speech at the University of California*, SAN FRANCISCO CHRON., Sept. 9, 1990, This World, at 8.

14. Lawrence, *supra* note 2, at 451.

15. It is not possible to formulate a restriction against racist speech that is narrow enough not to "catch[] in the same net all kinds of speech that . . . would be unconscionable for a democratic society to suppress." Charles Lawrence & Gerald Gunther, *Is There Ever a Good Reason to Restrict Free Speech on a College Campus?*, SAN FRANCISCO CHRON., Sept. 9, 1990, This World, at 10, 15.

16. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."); *see also*, GERALD GUNTHER, CONSTITUTIONAL LAW, 1164-66 (11th ed. 1985).

17. *See* Strossen *supra* note 11, at 560 (noting the positive outcome of allowing rather than prohibiting speech). "If these expressions had been chilled by virtue of university sanctions, then it is doubtful that there would be such widespread discussion on campuses, let alone generally, about the real problem of racism." *Id.* (footnote omitted).

18. 721 F. Supp. 852 (E.D. Mich. 1989); *see* discussion *infra* part II.D. A federal district court recently found another university speech restriction unconstitutionally vague and overbroad in UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

This comment discusses the constitutional doctrines of "fighting words," overbreadth, and vagueness.[19] The comment then applies the tests for "fighting words," overbreadth, and vagueness to the UC Harassment Policy.[20] Finally, the comment proposes an amendment to the UC Harassment Policy to protect students from personal harassment while mitigating the effects of censorship.[21]

II. BACKGROUND

The UC Harassment Policy is patterned after the speech-limiting "fighting words" doctrine. It is thus important to first understand the doctrine's rationale and current judicial treatment before testing the UC Harassment Policy for constitutional soundness.

A. *"Fighting Words" Doctrine*

The United States Supreme Court explained that language constituting "fighting words . . . which by their very utterance inflict injury or tend to incite an immediate breach of the peace" is not protected by the First Amendment.[22] Epithets or personal abuse are not considered communication safeguarded by the Constitution and are therefore subject to sanctions.[23] The theory of the regulation of " 'fighting words' is not contrary to the theory of the free marketplace of ideas because this speech triggers an automatic, unthinking reaction, rather than a consideration of an idea."[24]

The doctrine evolved in *Chaplinsky* when the Court upheld a breach of the peace conviction of a Jehovah's Witness for calling the City Marshal " 'a God damned racketeer' and 'a damned Fascist.' "[25] The conviction was based on a violation of a state statute which stated that no person "shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."[26] The Court's rationale was that the slight social value of "fighting words" as a step toward truth is outweighed by

19. *See* discussion *infra* part II.A-C.

20. *See* discussion *infra* part IV.A-C.

21. *See* discussion *infra* part V.A-C.

22. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

23. Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.").

24. 3 RONALD D. ROTUNDA ET AL., CONSTITUTIONAL LAW § 20.37 (1986).

25. *Chaplinsky*, 315 U.S. at 569-70.

26. *Id.* at 569.

the social interest in order and morality.[27] It should be noted that Chaplinsky was not convicted for his distribution of religious literature or the potential for public disturbance, but for his criticisms made directly to the City Marshal.[28]

The *Chaplinsky* "fighting words" doctrine includes the following elements: First, the speech is only unprotected in a face-to-face, verbal encounter where it invites reprisal at the time of the statement.[29] Next, the language must be inherently likely to produce a violent reaction.[30] Finally, the words must be likely to provoke retaliation by the average addressee; the doctrine does not require an actual violent response.[31] "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight."[32]

As originally developed, the "fighting words" doctrine focused on the content of the language rather than the context in which it was uttered.[33] Recent Supreme Court decisions have demonstrated, however, that the factual circumstances of the communication will be examined in addition to the content of the words themselves.[34] These cases uphold the "fighting words" doctrine, but also indicate that any "fighting words" convictions will be carefully scrutinized.[35] *Cohen v. California*[36] emphasized that the exception will be narrowly con-

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27. *Id.* at 572.

28. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.38 (1986).

29. *Chaplinsky*, 315 U.S. at 573. A "fighting words" statute is invalid on its face if it is not limited to words which have a direct tendency to inflict injury or to incite an immediate breach of the peace by the person to whom the remark is addressed. City of Houston v. Hill, 482 U.S. 451, 461-62 (1987) (citing Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974)).

30. *Chaplinsky*, 315 U.S. at 573.

31. *See* NOWAK ET AL., *supra* note 28, at § 16.38; *see also* Gooding v. Wilson, 405 U.S. 518, 523 (1972) (emphasizing that *Chaplinsky* was based on a state statute that only prohibited words which had a "direct tendency to cause acts of violence") (quoting *Chaplinsky*, 315 U.S. at 573).

32. *Chaplinsky*, 315 U.S. at 573.

33. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 850 (2d ed. 1988); *see also* Strossen *supra*, note 11, at 509 ("[T]he Court has invalidated regulations that hold certain words to be per se proscribable and insisted that each challenged utterance be evaluated contextually.").

34. *See, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697 (1974) (explaining that witness using the word "chickenshit" in court did not pose imminent threat); Hess v. Indiana, 414 U.S. 105 (1973) (holding that expletive stated during antiwar demonstration not sufficient for conviction); Street v. New York, 394 U.S. 576 (1969) (holding that statements made during flag-burning did not qualify as "fighting words").

35. ROTUNDA ET AL., *supra* note 24, § 20.40, at 198.

36. 403 U.S. 15 (1971) (overturning a conviction for breach of the peace based on the defendant's presence in a Los Angeles courthouse wearing a jacket lettered with "Fuck the Draft" on the back).

strued since offensive language must be directly addressed to the listener and provoke a hostile reaction.[37] As a result, the distinction between "fighting words" and offensive language is unclear. Offensive language, unlike "fighting words," is protected speech.[38]

The "fighting words" doctrine was reaffirmed in a more recent Supreme Court case, *Gooding v. Wilson*.[39] The Court stated, "Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression."[40] The *Gooding* Court struck down a Georgia statute which provided that "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."[41] Although the Court defined "opprobrious" and "abusive" as "conveying . . . disgrace," and "harsh insulting language,"[42] respectively, the Court held that "these were not words 'which by their very utterance . . . tend to incite an immediate breach of the peace,' "[43] those denominated "fighting words." The Court thus has construed "fighting words" restrictions to apply only in circumstances that lead to immediate violence.[44]

Rather than address the "fighting words" issue, the Court has often used the overbreadth[45] and vagueness[46] doctrines to invalidate statutes on their face.[47] Thus, it is important to understand the overbreadth and vagueness doctrines since a "fighting words" speech regulation must also pass these two tests to be constitutionally valid.

B. *Overbreadth Doctrine*

Overbreadth embodies the principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily

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37. *Id.* at 17.

38. *Id.* at 22-26 ("[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *see also* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

39. 405 U.S. 518, 523 (1972).

40. *Id.*

41. *Id.* at 519.

42. *Id.* at 525 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY (1961)).

43. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

44. *See* TRIBE, *supra* note 33, § 12-18, at 929 & n.9.

45. *See* discussion *infra* part II.B.

46. *See* discussion *infra* part II.C.

47. NOWAK ET AL., *supra* note 28, § 16.40, at 946.

broadly and thereby invade the area of [constitutionally] protected freedoms."[48] Therefore, a law is overbroad if it regulates "a substantial amount of constitutionally protected"[49] expression as well as speech or conduct not constitutionally protected. The overbreadth doctrine provides an exception for standing, along with potential invalidation of statutes on their "face" or "as applied."[50]

The overbreadth doctrine allows an exception to the ordinary standing requirement for constitutional adjudication.[51] For a justiciable constitutional claim, Article III of the United States Constitution[52] requires that a person assert a direct and immediate personal injury[53] and that the injury suffered be caused by the challenged violation.[54] In an overbreadth analysis, the court allows a challenger to assert rights of third parties not before the court.[55] "A litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."[56]

The injured party standing requirement is overlooked particularly in First Amendment contexts because of the potential deterrent effect on third party protected speech and association activities.[57] This third party standing exception has been justified by the Court because of the concern that third parties may refrain from engaging in constitutionally protected speech for fear of criminal sanctions by statutes potentially applicable to protected expression.[58] The Court will find a statute overbroad in order to remove the deterrent effect

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48. NAACP v. Alabama, 377 U.S. 288, 307 (1964).

49. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

50. *See* GUNTHER, *supra* note 16, at 1148; TRIBE, *supra* note 33, § 12-27, at 1023.

51. *But see* Henry Paul Monaghan, *Overbreadth*, SUP. CT. REV. 1 (1981). Professor Monaghan argues that the overbreadth doctrine "does not in fact possess a distinctive standing component; it is rather the application of conventional standing concepts in the First Amendment context." *Id.* at 3.

52. U.S. CONST. art. III, § 2, cl. 1 (providing judicial power to decide "cases or controversies"). For a discussion of the general rules of standing, see Russell Galloway, *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 921-29 (1990).

53. Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

54. Warth v. Seldin, 422 U.S. 490, 499 (1975).

55. *See* GUNTHER, *supra* note 16, at 1148-49. *But see* Monaghan, *supra* note 51, at 39 ("Overbreadth analysis is concerned with the substance of constitutional review; it does not rely on any distinctive standing component."). Professor Monaghan argues that overbreadth challenges involve first, not third party standing. *Id.* at 14-23.

56. Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980).

57. *Id.* at 620.

58. Gooding v. Wilson, 405 U.S. 518, 521 (1971).

on speech.[59] The resultant effect is that a statute must be narrowly drawn so as to punish only unprotected expression and have no susceptibility to protected speech.[60]

A statute may be found overbroad "on its face" or "as applied" to a particular litigant.[61] Invalidation of a statute on its face is "strong medicine."[62] This is because a statute overbroad on its face is invalidated not because of a litigant's particular situation, but because the statute "*might* be applied to others not before the Court whose activities *are* constitutionally protected."[63] As a result, an entire statute may be struck down before the statute is applied to the challenger.[64] Therefore, the statute may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the litigant has engaged in such privileged conduct.[65] Usually, in constitutional adjudication, statutes found unconstitutional are invalidated only as applied to the individual litigant.[66] However, the overbreadth methodology invalidates the *entire* statute "on its face."

A specific example of an overbroad statute that proscribed protected speech is found in *Lewis v. City of New Orleans*.[67] A city ordinance made it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference" to a police officer performing his duties.[68] The ordinance punished all vulgar and offensive language.[69] However, some of this type of language is constitutionally protected because all vulgar and offensive language does not necessarily constitute "fighting words."[70] Therefore, the Court held that the ordinance was constitutionally overbroad and facially invalid because it was "susceptible of application to protected

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59. *Id.*

60. *Id.* at 522.

61. *See* sources cited *supra* note 50.

62. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1971) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

63. GUNTHER, *supra* note 16, at 1149.

64. *Id.*; Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980).

65. NAACP v. Button, 371 U.S. 415, 432 (1963).

66. *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-24 (1974).

67. 415 U.S. 130 (1974).

68. *Id.* at 132.

69. *Id.* at 133. The Court stated that the dictionary definition of "opprobrious" included words " 'conveying or intended to convey disgrace' and therefore that the term was not limited to words which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' " *Id.* (quoting Gooding v. Wilson, 405 U.S. 518, 525 (1972)).

70. *Id.* at 134.

speech."[71] Since the ordinance was facially invalidated, it was irrelevant that the litigant's words could have been unprotected under a more narrowly drawn statute that did not reach protected speech.[72]

Laws which courts find void on their face for overbreadth have two primary characteristics: First, the laws prohibit both constitutionally protected and unprotected activity; second, the law may not be rehabilitated to reach only unprotected activity.[73] Facial invalidation, rather than a gradual narrowing of the laws on a case-by-case basis, is seen as the only remedy in these cases because of the "peculiarly vulnerable characteristics of activities protected by the First Amendment."[74] Laws proscribing speech will be tested only by those willing to risk criminal prosecution or other sanctions to determine the scope of the regulation.[75] If the court reaches the "as applied" analysis, the court will consider whether the challenger's particular situation could be reached by a more narrowly drawn law.[76] If the court finds the challenger's speech is protected, the law is, as a result, narrowed. In an overbreadth analysis, therefore, a litigant may challenge a law both as it applies to him or on its face.

In sum, the overbreadth doctrine encompasses a two part analysis. The court will first question whether the legislative means are as narrowly drawn as possible to achieve the governmental purpose as it is applied to the challenger before the court.[77] Second, the court will question whether application of the statute will violate the constitutional rights of third parties not before the court, regardless of whether the specific litigant's rights are protected.[78] If so, the statute will be invalidated on its face.

C. *Vagueness Doctrine*

While the vagueness doctrine parallels the overbreadth doctrine,[79] it is distinct. "A law that does not reach constitutionally pro-

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71. *Id.*

72. *Id.* at 133.

73. *See* TRIBE, *supra* note 33, § 12-27, at 1022.

74. *See* TRIBE *supra* note 33, § 12-27, at 1023.

75. *See* TRIBE, *supra* note 33, § 10-27, at 1022.(quoting Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)).

76. *See* GUNTHER, *supra* note 16, at 1149.

77. Monaghan, *supra*, note 51, at 3. *But see* GUNTHER, *supra* note 16, § 12-1, at 1149 n.5 ("Should the Justices be under an obligation to explain what narrower means are available to achieve the state's objective?").

78. GUNTHER, *supra* note 16, at 1149.

79. The overbreadth doctrine strikes laws which prohibit constitutionally protected conduct along with conduct which may be forbidden. *See* discussion *supra* part II.B. The vague-

tected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process."[80] Vagueness analysis focuses on the clarity of the law.[81]

First, the challenged law must provide adequate notice of the type of conduct prohibited.[82] To satisfy procedural due process, the notice must provide a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[83] A law is void for vagueness on its face if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[84] The court evaluates both the words and prior judicial constructions of the statute.[85]

For example, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[86] the Court upheld a local ordinance requiring licensing for the sale of products "designed or marketed for use" with illegal drugs because a "business person of ordinary intelligence would understand" the terms and their application.[87] A business person would understand that "designed for use" refers to the design of the manufacturer and that "marketed for use" refers to a retailer's merchandise display.[88]

The notice element has evolved into strict judicial scrutiny especially when it relates to fundamental constitutional rights such as freedom of speech.[89] A vague law proscribing speech has a chilling effect that deters people from engaging in constitutionally protected speech. On the other hand, an unclear zoning statute may deter

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ness doctrine strikes laws which are unclear. *See infra* note 81 and accompanying text.

80. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). The constitutional basis for vagueness is found in the notice requirement of the Fifth Amendment's Due Process Clause. U.S. CONST. amend. V, cl. 3; *see, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927). Yet, the vagueness doctrine is applied in the First Amendment arena because a vague statute has the same chilling effect on protected speech as an overbroad statute. *See* TRIBE, *supra* note 33, § 12-31, at 1034.

81. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

82. *Id.*

83. Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951).

84. *Grayned*, 408 U.S. at 108-14; Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

85. *See, e.g., Grayned*, 408 U.S. at 110-111.

86. 455 U.S. 489 (1982).

87. *Id.* at 500-01.

88. *Id.* at 501-02.

89. *Grayned*, 408 U.S. at 109; Keyishian v. Board of Regents, 385 U.S. 589, 597-604 (1967); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

property use, but does not rise to the same caliber of constitutional significance.[90] The Court has been more tolerant of statutes with civil rather than criminal penalties because the consequences of vagueness are less severe; nevertheless, civil statutes are subject to the vagueness test.[91] Finally, inclusion of a scienter requirement may mitigate a law's vagueness, especially with respect to notice.[92]

Second, the court scrutinizes the law for potential arbitrary and discriminatory enforcement.[93] This scrutiny recently evolved into an independent factor.[94] An application of this factor is illustrated in *Smith v. Goguen*.[95] Goguen was convicted of violating a statute prohibiting "contemptuous" conduct against the United States flag by wearing a flag on the seat of his pants.[96] The Court reversed his conviction on the grounds that the statute was void for vagueness.[97] Although the statute did not provide adequate notice, the Court emphasized that police, prosecutors, and juries would determine and enforce which acts were violations based on personal preferences.[98]

Prohibition of discriminatory enforcement was later formally recognized as the primary goal of the vagueness doctrine in *Kolender v. Lawson*.[99] In *Kolender,* the Court overturned a statute that allowed police to stop people loitering on the street and require identification.[100] The Court was concerned that police could arbitrarily enforce the statute and stop individuals without cause.[101] This was especially disconcerting to the Court because of the potential for arbitrary suppression of First Amendment freedoms for individuals.[102]

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90. NOWAK ET AL., *supra* note 28, § 16.9, at 846.

91. *Village of Hoffman Estates*, 455 U.S. at 498-99 (upholding statute which did not deter lawful speech). When there is a danger the law will "chill" constitutionally protected speech, the Court applies a more stringent vagueness test. *Id.* at 499.

92. *Id.* The scienter requirement ensures adequacy of notice of the proscribed conduct. *Id. See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 395 (1979) (striking down a criminal statute without an intent requirement because it was a "trap for those who act in good faith").

93. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

94. *Id.* at 109.

95. 415 U.S. 566 (1974).

96. *Id.* at 570.

97. *Id.* at 582. The statute provided, in relevant part: "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . shall be punished." *Id.* at 568-69. The "treats contemptuously" language was held void for vagueness because it failed "to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not." *Id.* at 574.

98. *Id.* at 575.

99. 461 U.S. 352, 358 (1983).

100. *Id.* at 361.

101. *Id.* at 358.

102. *Id.*

A vague statute may be saved if it can be construed to provide definitions that are at least as clear as those used in common law.[103] Alternatively, a vague statute may be saved if the statute can be limited.[104] This is especially true when statutes are limited to "categories" of speech that are unprotected.[105] However, when a statute's scope has not been narrowed by any state court interpretation and reaches expression protected by the First Amendment, the vagueness doctrine demands much greater precision than in other contexts.[106] In the First Amendment arena, the vagueness doctrine prohibits statutes that restrain speech in vague terms that would include protected forms of speech or make it unclear as to when speech would violate the statute.[107]

The Court cited statutes with First Amendment ramifications as another distinct aspect of the vagueness doctrine in *Grayned v. City of Rockford*.[108] The *Grayned* Court upheld an anti-noise ordinance against vagueness and overbreadth challenges. The ordinance read: "[N]o person . . . shall willfully make . . . any noise or diversion which disturbs or tends to disturb [class in session]."[109] The Court held that the vagueness of the terms "noise" and "diversion" was dispelled by the statute's three requirements: "(1) the 'noise or diversion' [must] be actually incompatible with normal school activity; (2) there [must] be a demonstrated causality between the disruption that occurs and the 'noise or diversion'; and (3) the acts [must] be 'willfully' done."[110]

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103. Rose v. Locke, 423 U.S. 48, 50 (1975).

104. Chaplinsky v. New Hampshire, 315 U.S. 568, 573-74 (1942). Since the New Hampshire courts had consistently construed the statute to apply only to "fighting words," the Court upheld the proscription of "offensive, derisive, or annoying" comments. *Id.*

105. Recent Cases, 103 HARV. L. REV. 1397, 1401 n.42 (1990) (discussing Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989)). See *infra* note 124 for examples of unprotected speech categories.

106. Smith v. Goguen, 415 U.S. 566, 573 (1974). For example, vagueness cases dealing with purely economic regulation impose less stringent requirements. *E.g.*, United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) (Robinson-Patman Act).

107. NOWAK ET AL., *supra* note 28, § 16.9, at 847. "The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).

108. 408 U.S. 104, 109 (1972).

109. *Id.* at 107-08. The statute states:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.

Id.

110. *Id.* at 113-14.

The *Grayned* Court also recognized that in assessing the regulation's reasonableness, the fact that communication is involved must be heavily weighed; therefore the regulation itself must be narrowly tailored to a legitimate state interest.[111] The Court concluded that the regulation in that case did not unnecessarily interfere with First Amendment rights because the regulation was "narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning."[112] Yet the Court added that the ordinance was reasonable because it "gives no license to punish anyone because of what he is saying."[113]

The first case to address the constitutionality of a university harassment speech restriction is *Doe v. University of Michigan*.[114] The court applied both the overbreadth and vagueness doctrines to a campus ordinance, providing insight as to how the doctrines would apply to other hate speech restrictions.

D. *Doe v. University of Michigan*

In response to several incidents of racism and racial harassment,[115] the University of Michigan adopted a policy which prohibited individuals, under the penalty of sanctions, from "stigmatiz[ing] or victimiz[ing] an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[116] A psychology graduate student, under the pseudonym John Doe, challenged the University policy as vague and overbroad.[117] He sought to enjoin enforcement because he feared that classroom discussion in biopsychology[118] would be impermissibly chilled.[119]

Doe based his concern on an interpretive guide issued by the University Office of Affirmative Action, which suggested that Michigan students could be sanctioned for such actions as laughing at a

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111. *Id.* at 116-17.

112. *Id.* at 119.

113. *Id.* at 120.

114. 721 F. Supp. 852 (E.D. Mich. 1989).

115. One incident cited was an anonymous distribution of a flier declaring "open season" on blacks, referred to as "saucer lips, porch monkeys, and jigaboos." *Id.* at 854.

116. *Id.* at 856.

117. *Id.* at 861.

118. Biopsychology is described as "the interdisciplinary study of the biological bases of individual differences in personality traits and mental abilities." *Id.* at 858.

119. Doe claimed that certain controversial theories postulating biologically based differences between sexes and races might be perceived as "sexist" and "racist," making discussion of such theories sanctionable. *Id.*

joke about a classmate who stutters, telling "jokes about gay men and lesbians," commenting "in a derogatory way about a particular person or group's physical appearance or sexual orientation," or remarking in class that "women just aren't as good in this field as men."[120] One Michigan student had already been subjected to a formal disciplinary hearing for having said in a social work research class that he believed homosexuality was a psychologically treatable disease.[121] Although the University withdrew the guide at the time of the suit, and Doe had not been subject to enforcement of the policy, the court declared that Doe had standing because "there existed a realistic and credible threat that Doe could be sanctioned were he to discuss certain biopsychological theories."[122]

The court outlined the types of behavior that may be subject to state regulation. Conduct may be regulated by the state,[123] but "pure speech" cannot be regulated unless the speech falls into an unprotected category.[124] In particular, the court stated that under specific instances, racial and ethnic epithets, slurs, and insults may be "fighting words" and could constitutionally be prohibited by the University.[125] "Nevertheless, [the court] failed to explore whether the [U]niversity's policy could be interpreted as forbidding only fighting words, perhaps because Supreme Court cases have left that area virtually empty."[126] The court found that the University could not proscribe speech that it disagreed with or even found offensive.[127] It then emphasized the special significance of these speech principles in the academic arena, "where the free and unfettered interplay of com-

120. *Id.*

121. *Id.* at 861.

122. *Id.* at 859-60.

123. *Id.* at 861-62; *see* TRIBE, *supra* note 33, § 12-7, at 599. *But see* Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that flag-burning is constitutionally protected as a form of "symbolic speech").

124. Doe v. University of Michigan, 721 F. Supp. 852, 862-63 (E.D. Mich. 1989). Examples of wholly unprotected categories include: "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); obscenity, Miller v. California, 413 U.S. 15 (1973); child pornography, New York v. Ferber, 458 U.S. 747 (1982); incitement to imminent unlawful action, Brandenberg v. Ohio, 395 U.S. 444 (1969); libelous statements of no public interest, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); *see also* discussion in TRIBE, *supra* note 33, § 12-18, at 929-30. Professor Tribe proposes that the Court is constructing a "multi-level edifice" of intermediate categories of speech that are only partially constitutionally protected, such as commercial speech and offensive speech. TRIBE, *supra* note 33, § 12-18 at 929-30.

125. *Doe*, 721 F. Supp. at 862.

126. Recent Cases, *supra* note 105, at 1398 n.11.

127. *Doe*, 721 F. Supp. at 863.

peting views is essential to the institution's educational mission."[128]

The *Doe* court found the policy overbroad both on its face and as applied because it reached constitutionally protected speech.[129] The policy was facially overbroad because the Supreme Court has uniformly held that statutes which proscribe speech or conduct solely because they are offensive are unconstitutionally overbroad.[130] Furthermore, the manner of resolution of three complaints regarding student classroom remarks demonstrated that the policy had been interpreted to reach protected conduct.[131]

As applied, the policy was overbroad because the threat of being brought before a hearing panel would chill academic discourse.[132] For example, the University Administrator attempted to persuade an accused student to accept voluntary sanctions. However, a subtle threat existed that failure to accept sanctions would result in a formal hearing.[133]

Finally, the court struck down the policy as unconstitutionally vague.[134] The court stated that " 'stigmatize' [and] 'victimize' . . . elude precise definition."[135] Furthermore, the policy was unclear as to "what kind of conduct would constitute a 'threat' to [or interference with] an individual's academic efforts."[136] The court found that "[s]tudents of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found . . . sanctionable under the Policy."[137] Enforcement of the vague policy would constitute a due process violation.[138]

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128. *Id.*

129. *Id.* at 866.

130. *Id.* at 864.

131. *Id.* at 866. One complaint involved a student's statement that homosexuality is a treatable disease, *see supra* text accompanying note 121, which resulted in a formal hearing but no conviction. A second complaint was filed against a student for reading an allegedly homophobic limerick in class. A third complaint involved an allegedly racist remark. These complaints were informally resolved with apologies and attendance at a " 'gay rap'session" for the perpetrator of the allegedly anti-gay remarks. *Id.* at 865-66.

132. "[T]he University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy." *Id.* at 866.

133. *Id.*

134. *Id.* at 866-67.

135. *Id.* at 867.

136. *Id.*

137. *Id.*

138. *Id.; see, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (stating that vague laws violate due process).

III. STATEMENT OF THE PROBLEM

The University of California amended its policies applying to student conduct to prohibit the use of "fighting words" to harass another based on race, ethnicity, religion, sex, sexual orientation, disability, or other personal characteristics.[139] This policy espouses the idea "that words can be used in such a way that they no longer express an idea, but rather are used to injure and intimidate, thus undermining the ability of individuals to participate in the university community."[140]

Racist speech, in particular, has been the focus of the controversy.[141] Racial insults have been described as unworthy of First Amendment protection because "[t]he perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim."[142] A significant underlying assumption behind such campus regulations, therefore, is that such speech victimizes historically disadvantaged groups so the adoption of such speech regulations prevents the perpetuation of discrimination and inequality.[143]

Opponents contend that the university is the "marketplace of ideas,"[144] and that the fear of punishment under any speech restriction will chill free expression.[145] The Court noted in the flag-burning decision of *Texas v. Johnson*[146] that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[147] As a result, the debate has been framed in terms of a "tension between the free speech pro-

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139. UC Harassment Policy, *supra* note 4.

140. William A. Rusher, *Fighting Words vs. Symbols,* 4 CONSERVATIVE CHRON. 26 (1989) (quoting David Gardner, University of California President).

141. *See, e.g.,* Lawrence, *supra* note 2; Strossen, *supra* note 11.

142. Lawrence, *supra* note 2, at 452.

143. *See* Matsuda, *supra* note 12, at 2374-81 (arguing that both substantive and procedural equality must be achieved prior to free speech enforcement); Delgado, *supra* note 1 (advocating enactment of a tort cause of action for racial insults).

144. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

145. For example, one news article noted: "On the campus that just a generation ago produced the Free Speech Movement, a sullen reticence has taken hold. Students and faculty alike have grown hesitant to express unpopular views that might be branded as racist. The "chilling effect" of the fighting words policy is apparent." Eisenberg, *supra* note 13, at 16; *see also* Jerry Adler et al., *Thought Police,* NEWSWEEK, Dec. 24, 1990, at 48 (discussing the current "experiment" on college campuses to eliminate prejudice through regulation of "politically correct" ways to express views on race, sex, and other personal characteristics); Steve France, *Hate Goes to College,* A.B.A. J., July 1990, at 44 (discussing the debate over hate speech regulations).

146. 491 U.S. 397 (1989).

147. *Id.* at 414.

visions of the First Amendment and the equal protection guarantees of the [Fourteenth] Amendment."[148]

IV. ANALYSIS

An effective analysis of whether the UC Harassment Policy unconstitutionally restricts protected speech must include a review of both the language and the application of the policy. "Many factors, which are heavily fact-oriented, must be considered, including time, place, pattern of conduct and, where relevant, the existence of an authority relationship between speaker and target."[149] This is primarily because the "fighting words" doctrine has evolved into a context-based violation.[150]

A. *Vagueness and the University of California Harassment Policy*

Although the Supreme Court is more tolerant of vagueness in laws with civil rather than criminal sanctions,[151] strict judicial scrutiny will be applied to laws which regulate fundamental constitutional rights such as free speech.[152] The penalties for violation of the UC Harassment Policy do not include incarceration, but potential ramifications such as suspension or dismissal, which carry a social stigma and have serious effects on future educational and employment opportunities.[153] This regulation can therefore be seen as quasi-criminal and further supports strict judicial scrutiny for vagueness.

The two words central to the UC Harassment Policy that could be subject to vagueness infirmities are "fighting words"[154] and "har-

148. Bill Blum & Gina Lobaco, *Fighting Words at the ACLU,* CALIF. LAW., Feb. 1990, at 44.

149. Strossen, *supra* note 11, at 572 n.442; *see also supra* note 34 and accompanying text.

150. TRIBE, *supra* note 33, §12-18, at 929 & n.9.

151. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

152. Smith v. California, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."); *see also* Smith v. Goguen, 415 U.S. 566, 573 (1974) ("These considerations apply with particular force where the challenged statute acts to inhibit freedoms affirmatively protected by the constitution.").

153. *E.g.*, UNIV. OF CAL., BERKELEY, BERKELEY CAMPUS REGULATIONS IMPLEMENTING UNIVERSITY POLICIES §§ 430-438 (1985).

154. *See infra* part IV.B. for discussion of the "fighting words" doctrine as it is applied in the UC Harassment Policy.

ass."[155] A court will analyze both the plain language of the words as well as the context of the statute's enforcement for potential vagueness.

The word "harassment," was held unconstitutionally vague in *Dorman v. Satti,*[156] where the Second Circuit invalidated a statute that prohibited "harassment" of persons "engaged in the lawful taking of wildlife," partly due to the susceptibility of "harassment" to different interpretations.[157] The UC Harassment Policy defines "harassment" as when the utterance of "fighting words" will "interfere with the victim's ability to pursue effectively his or her education."[158] Similarly, the *Doe* court explained that the University of Michigan policy sanctioned comments that had the "purpose or reasonably foreseeable effect of interfering with an individual's academic efforts."[159] However, the court found that the type of conduct that would interfere with an individual's academic efforts was "questionable."[160] Hence, the *Doe* court held that the policy was vague because the interpretive policy gave inadequate guidance as to what comments were sanctionable.[161] "[T]he university never articulated any principled way to distinguish sanctionable from protected speech. Students were necessarily forced to guess . . . ."[162] Similar to the University of Michigan policy, the UC Harassment Policy may be unconstitutionally vague without additional guidance from the university administration regarding what defines "harassment."

In addition to analyzing the plain language of the words "harassment" and "fighting words," the court will also look at the potential discriminatory enforcement of the law. One commentator has noted that "[r]egardless of how carefully these rules are drafted, they inevitably are vague and unavoidably invest officials with substantial discretion in the enforcement process."[163]

However, a vague statute may be saved if the scope is narrowly defined, such as limiting regulations to speech categories not constitutionally protected.[164] This is the primary difference between the University of Michigan policy which was struck down for vagueness

155. UC Harassment Policy, *supra* note 4.
156. 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).
157. *Id.* at 433, 436; *see also* Strossen, *supra* note 11, at 527 n.206.
158. UC Harassment Policy, *supra* note 4.
159. Doe v. University of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989).
160. *Id.* at 867.
161. *Id.*
162. *Id.*
163. Strossen, *supra* note 11, at 528.
164. *See supra* notes 104-05 and accompanying text.

and the UC Harassment Policy. The UC Harassment Policy regulates only "fighting words" while the University of Michigan policy proscribed a broad, undefined category of speech.

In the First Amendment context, statutes that restrain speech in vague terms either include protected forms of speech or make a person of common intelligence guess as to whether his speech violates the statute.[165] The *Grayned* holding indicates that regulations involving communication must be strictly scrutinized while the regulation itself must be narrowly tailored to a legitimate state interest.[166] The objective of campus speech regulations is to achieve an academic environment conducive to learning, free of racial or violent harassment. This is a compelling state interest, similar to the school district's interest in *Grayned* to have an undisrupted school session conducive to students' learning.[167] Therefore, the state interest behind the UC Harassment Policy is sufficient to uphold the policy.

Vague statutes can be saved if the scope of the statute is limited. Therefore, the vagueness of "fighting words" and "harass" in the UC Harassment Policy can be saved if the regulation is limited to forms of *unprotected* speech. In this case, the regulation is specifically limited to "fighting words," a recognized exception to constitutionally protected speech.[168] The UC Harassment Policy is more narrowly drafted than the University of Michigan anti-harassment policy which was struck down for vagueness. The University of Michigan policy proscribed "*any* behavior . . . that stigmatizes or victimizes an individual [which] creates [a] hostile . . . environment for educational pursuits."[169] However, the UC Harassment Policy proscribes a narrow category of speech, "fighting words," "when their use creates a hostile educational environment."[170] Since the UC Harassment Policy is solely limited to "fighting words," held as unprotected speech by the Supreme Court, a vagueness challenge would fail.

B. *Fighting Words Doctrine*

Since the UC Harassment Policy relies entirely on proscription of "fighting words," the regulation also must be analyzed in its ap-

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165. Grayned v. City of Rockford, 408 U.S. 104, 120 (1972).

166. *Id.* at 121.

167. *Id.* at 110-11.

168. *See* discussion *supra* part II.A.

169. Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989) (emphasis added).

170. UC Harassment Policy, *supra* note 4.

plication of the "fighting words" doctrine. One commentator has summarized the current developments of the "fighting words" doctrine into four distinct criteria which must all be fulfilled for proper invocation.[171] The offending language (1) must constitute a personally abusive epithet, (2) must be addressed in a face-to-face manner, (3) must be directed to a specific individual and be descriptive of that individual, and (4) must be uttered under such circumstances that the words have a direct tendency to cause an immediate violent response by the average recipient.[172]

First, the UC Harassment Policy specifically defines "fighting words" as "personally abusive epithets."[173] The first element is therefore met.

Second, the face-to-face requirement, although not specifically stated in the policy, is met by the phrase: "when directly addressed to any ordinary person."[174] This requirement has been construed by the judiciary to mean an "extremely close" physical presence.[175] For example, a speaker fifteen feet away and driving by the target has not satisfied the test.[176]

Third, although the UC Harassment Policy does not state that the words must be "descriptive" of a specific individual, it proscribes derogatory references to "personal characteristics."[177] Hence, the UC Harassment Policy meets the third criteria of the "fighting words" doctrine because "personal characteristics" implies a description of a particular individual being addressed.

Finally, the Supreme Court has based the "fighting words" doctrine not simply on the content of the speech, but also on the context in which the speech is uttered. "Fighting words" definitions based solely on content have been struck down by the Court.[178] Therefore, to pass constitutional muster, any statute that proscribes "fighting words" cannot simply refer to the words themselves, but must indicate that the utterance of the words must be likely to cause an immi-

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171. Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 563 (1980). The original "fighting words" doctrine outlined by the United States Supreme Court combined the face-to-face and individual encounter as one element. *See supra* notes 29-32 and accompanying text.

172. Gard, *supra* note 171, at 563.

173. UC Harassment Policy, *supra* note 4.

174. UC Harassment Policy, *supra* note 4.

175. Strossen, *supra* note 11, at 525.

176. Strossen, *supra* note 11, at 525 & n.201.

177. UC Harassment Policy, *supra* note 4.

178. *See supra* notes 33-38 and accompanying text.

nent breach of the peace.[179] The UC Harassment Policy stipulates that "fighting words" are "in the *context used* and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so."[180] The UC Harassment Policy thus passes the fourth and final element of the "fighting words" doctrine.

In sum, the UC Harassment Policy explicitly fulfills all of the elements of the "fighting words" doctrine as delineated by the Supreme Court.

C. *Overbreadth*

Any speech regulation will be found overbroad, and therefore void, if it regulates a substantial amount of protected speech in addition to the proscribed unprotected speech.[181] The regulation must be analyzed both on its face and as applied. For example, the *Doe* court found the University of Michigan code overbroad, not necessarily based on its language but on its enforcement record.[182] "The manner in which . . . complaints were handled demonstrated that the University considered serious comments made in the context of classroom discussion to be sanctionable under the Policy."[183]

The UC Harassment Policy speech regulation is susceptible to invalidity if it chills speech beyond "fighting words." However, "there is a real danger that even a narrowly crafted [hate speech] rule will deter some expression that should be protected."[184] It is inevitable that students may be concerned that a hate speech rule will be used to suppress unpopular views, so that students will refrain from expressing controversial viewpoints. The climate on college campuses has resulted in usage of terminology and discussion of ideas that are only "politically correct."[185] Hence,"anti-harassment rules conceived primarily to protect racial minorities from hateful epithets tend to get extended to a far wider range of speech . . . these rules cast a shadow over much speech that ought to enjoy First Amendment protection."[186]

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179. Strossen, *supra* note 11 at 525; Gard, *supra* note 171, at 536.
180. UC Harassment Policy, *supra* note 4 (emphasis added).
181. *See* overbreadth discussion *supra* part II.B.
182. Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989).
183. *Id.* at 866; *see supra* note 131 and accompanying text.
184. Strossen, *supra* note 11, at 529.
185. Adler et al., *supra* note 145, at 48-49.
186. Stuart Taylor Jr., *Fending off Fighting Words,* LEGAL TIMES, Jan. 1, 1990, at 19.

Although the UC Harassment Policy fulfills all the legal parameters for the definition of "fighting words,"[187] a student is still left with generalizations such as "a matter of common knowledge . . . inherently likely to provoke a violent reaction."[188] The UC Harassment Policy could still be invalidated as overbroad on its face if it prevents students from exercising their right to freedom of expression. The UC Harassment Policy should be narrowly drawn to not have any such susceptibility.

In the present form, the UC Harassment Policy is not drafted narrowly enough to withstand an overbreadth challenge. Since a student will be careful not to approach the "fighting words" line, the natural repercussion is chilling speech and suppressing a fundamental right under the First Amendment. It is difficult to ascertain when a comment on an individual's characteristic is a mere expression and when it crosses the line and becomes a "fighting word." Although the UC Harassment Policy definition for "fighting words" has met all of the constitutional requirements for "fighting words," the category still could keep students from expressing unpopular views to avoid the risk of being subject to sanctions such as dismissal. Since such expression is often in a grey area, only those willing to risk sanctions would be willing to test the bounds of this speech regulation. As a result, the UC Harassment Policy is overbroad on its face and does not pass constitutional muster because its application could reach both protected and unprotected speech.

V. PROPOSAL

The controversy continues in the legal and academic communities as to the most effective type of anti-harassment standards, or even whether any such regulations should be enacted. All have agreed, though, that the increase of racial intolerance on college campuses must be addressed. The University of California decided on a "fighting words" policy. Other campuses, in addition to utilizing "fighting words" formats, have chosen alternative formats for anti-harassment policies.[189] Two popular formats include policies modeled after the intentional infliction of emotional distress doctrine and environmental impact standards.

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187. *See supra* part IV.B.

188. UC Harassment Policy, *supra*, note 4.

189. *See infra* note 193.

A. *Intentional Infliction of Emotional Distress*

One anti-harassment policy format is modeled after the tort for intentional infliction of emotional distress.[190] The appeal of this policy format is that it focuses on the type of harm most commonly associated with racist speech directed at individuals.[191] The individual suffers psychological and emotional harm which interferes with his or her pursuit of an education. "Fighting words" policies address *violent* reactions by the addressee, which are less likely to result than intimidation and emotional hostility.

The key disadvantage to using the pure tort for campus speech regulation is that it primarily focuses on the victim's reaction. Stanford University, for instance, decided against using this tort for its anti-harassment policy: "We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed."[192]

B. *Environmental Impact Standards*

Other schools have adopted formats for anti-harassment policies that focus on the effect on the learning environment for groups and individuals.[193] Advocates of this format believe that it is most consistent with the objectives of achieving an academic environment equally accessible to all individuals.[194] However, environmental policies that are too broad are inconsistently applied as administrations change. Broad environmental policies also risk failing the constitutional tests for vagueness or overbreadth.

For example, the University of Michigan policy found void in *Doe* was a broad environmental policy. The *Doe* court examined the requirement that "victimizing" language had to affect an individual in one of three ways. It had to either threaten an individual's academic efforts, interfere with such efforts, or create an intimidating

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190. Strossen, *supra* note 11, at 514-17. RESTATEMENT (SECOND) OF TORTS § 46 (1965) states that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress."

191. Strossen, *supra* note 11, at 515. *See generally* Matsuda, *supra* note 12.

192. Strossen, *supra* note 11, at 516 n.157.

193. Dean Gerald Uelmen, When Freedom Harms: The Conflict Between the Freedom of Expression and the Banning of Harassment, Address at Santa Clara University (Nov. 8, 1990) (tape and transcript available in Santa Clara University Orradre Library, Center for Applied Ethics) (categorizing campus anti-harassment policies into three types: (1) broad, undefined standards, (2) "fighting words" policies, and (3) environmental impact standards).

194. *Id.*

environment for academic pursuits.[195] The court found these clauses made the statute vague because "it was simply impossible to discern any limitation on [the statute's] scope or any conceptual distinction between protected and unprotected conduct."[196]

C. *Revising the UC Harassment Policy*

Although the intentional infliction of emotional distress and environmental impact formats have specific advantages, such benefits are outweighed by their weaknesses. Therefore, rather than enacting an entirely new format for the University of California anti-harassment policy, the existing policy should be amended to eliminate the overbreadth problem and achieve the objectives of an open learning environment.

The UC Harassment Policy passes the tests for both "fighting words" and constitutional vagueness; however, a litigant could defeat the policy on overbreadth grounds.[197] The policy is overbroad because it chills expression protected by the Constitution. In order to mitigate the effects of such self-censorship, while protecting all students from personal harassment, the UC Harassment Policy should be amended to focus on the intent and context of the expression rather than on the content of the expression. Therefore, along with eliminating the "fighting words" focus, the UC Harassment Policy should be amended by the following definition of "harassment": Any action made with the *intent* of inflicting emotional distress upon another individual will constitute harassment when in the context used, and as a matter of common knowledge, it is inherently likely to result in severe emotional distress which interferes with the individual's academic efforts.[198]

The primary change is that the UC Harassment Policy should articulate an intent requirement. Although the anti-harassment policy is not a criminal statute, the severity of sanctions such as suspension or dismissal can be considered quasi-criminal in nature because of their social stigma and impact on an individual's livelihood. The resultant potential for chilling expression calls for an intent

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195. Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989).

196. *Id.* at 867.

197. *See supra* parts IV.A-C.

198. The American Civil Liberties Union (ACLU) proposed a similar alternative to the University of Michigan regulation found void for vagueness in *Doe,* 721 F. Supp. at 852; *see* Strossen, *supra* note 11, at 520 n.177 (Proposed alternative would proscribe "any action directed toward another student . . . with the specific intention of inflicting emotional distress . . . or interfering with . . . academic efforts.").

requirement.

This proposal would pass constitutional muster because it eliminates the overbreadth problem. Protected speech such as academic discourse would not be chilled because a speaker must intend to hurt particular individuals rather than merely add an unpopular or non-politically correct viewpoint to a classroom discussion.[199] Thus, speech directed at individuals with the intent to hurt those individuals would violate the anti-harassment policy, whereas voicing an unpopular opinion not directed at particular individuals, as in a classroom setting, would not be sanctionable. The proposed amended policy also removes the inherent difficulties in a "fighting words" construction since the UC Harassment Policy's application would no longer depend on each epithet to fit in the four criteria for proper invocation of the doctrine.[200]

The intent appropriate for this policy would be the same as that required for the tort of intentional infliction of emotional distress. The defendant either desires to cause the distress or knows that it is substantially likely to follow from his or her actions.[201] Some cases have also extended the requirement to include "conduct not intended to cause mental disturbance, but willful, wanton or reckless in its deliberate disregard of a known high degree of risk of it."[202] For instance, a threatening phone call or face-to-face torment for being homosexual would fulfill the requisite intent requirement while class discussions usually would not rise to the required level of specific intent.

Finally, although an element of the tort of intentional infliction of emotional distress is the resultant emotional distress itself,[203] the proposed amended UC Harassment Policy would not necessarily require proof of emotional distress. Any measurement of emotional distress would be highly subjective and oftentimes difficult to prove, which may prevent individuals from reporting incidents. However, the proposed amendment incorporates the advantage of codes modeled after the tort of intentional infliction of emotional distress

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199. Both criminal and civil statutes, for example, have been saved from constitutional attack with the inclusion of an intent requirement. *See, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Colautti v. Franklin, 439 U.S. 379, 395 (1979); Smith v. Goguen, 415 U.S. 566, 585 (1974) (White, J., concurring); Screws v. United States, 325 U.S. 91, 101-03 (1945).

200. *See supra* notes 171-72 and accompanying text.

201. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 64 (5th ed. 1984).

202. *Id.* at 65.

203. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

because it focuses on the harm to the victim, rather than on the content of the language uttered. In order to prevent unfounded charges of racism or sexism, the proposed amended UC Harassment Policy requires only that emotional distress must, as a matter of common knowledge, be inherently likely to result from the speaker's expression.

VI. CONCLUSION

The UC Harassment Policy is a speech restriction based on the "fighting words" exception to the First Amendment. This comment set forth the current judicial treatment of the "fighting words" doctrine. Since the Supreme Court has often used the vagueness and overbreadth doctrines to invalidate "fighting words" statutes, the comment also analyzed these two constitutional doctrines. The comment discussed the application of the vagueness and overbreadth doctrines in *Doe v. University of Michigan*.[204] The comment then applied the tests for "fighting words," overbreadth and vagueness to the UC Harassment Policy. Finally, the comment proposed an amendment to the UC Harassment Policy to protect students from personal harassment while mitigating the effects of censorship.

One commentator questioned, "Is it possible to protect individual minority students from being harassed with racist epithets and other personal abuse on campus without getting into censorship of everything from casual conversations to tasteless T-shirts?"[205] The answer is "yes." Although it is a fine distinction, a campus regulation focusing on intent, context and resultant distress could protect all students from any type of personal harassment and ensure equal educational opportunity. Most importantly, though, if narrow rules proscribing speech are adopted by college campuses, they should be part of an overall program designed to address biases such as sexism, homophobia and racism.[206] Excessive attention to speech content will

204. 721 F. Supp. 852 (E.D. Mich. 1989).

205. Taylor, *supra* note 186.

206. *See* Strossen, *supra* note 11, at 572 (citing the ACLU suggestions for campus programs to combat various forms of bias in conjunction with regulations.); *World News Tonight: American Agenda, The Question of Speech and Banning of Racist Remarks* (ABC television broadcast, Nov. 1, 1990) (reporting on campus workshops such as those at the University of Wisconsin designed to increase awareness of stereotypes and prevent the harassment that speech regulations proscribe); Marilyn Soltis, *Sensitivity Training 101*, A.B.A. J., July 1990, at 47 (discussing cultural sensitivity programs offered at the University of Connecticut and University of San Diego).

divert our energy from addressing the causes of prejudice to merely attacking the symptoms.

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